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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

WASSAN BENNY, Plaintiff and Appellant, v. SONIC SANTA MONICA M, INC. et al., Defendants and Respondents.	B265677 (Los Angeles County Super. Ct. No. SC116245)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gerald Rosenberg. Affirmed.

Law Offices of Robert B. Mobasseri, Robert B. Mobasseri, David A. Cooper and Amy L. Hajduk Plaintiff and Appellant.

LeClairRyan, Robert G. Harrison and Judd A. Gilefsky for Defendants and Respondents.

A jury awarded damages to plaintiff and appellant Wassan Benny against defendants and respondents Sonic Santa Monica M., Inc. and Mercedes-Benz USA, Inc., (hereafter Mercedes-Benz) on a claim for breach of the implied warranty of merchantability under the Song-Beverly Act (Civ. Code, § 1790 et seq.), finding that her car contained a defective transmission. During post-trial proceedings, the trial court granted Mercedes-Benz's motion for a new trial on the ground that the special verdict form contained legal error. Benny appeals the order granting a new trial. We affirm.

FACTS

Background

On March 27, 2006, Benny bought a new 2007 Mercedes-Benz S550 from a Mercedes-Benz dealership doing business as "W.I. Simonson" for $91,325. The car had an express warranty that would expire within four years from the purchase date – March 27, 2010 – or when it had been driven 48,000 miles.

On December 14, 2009, Benny was driving her daughter home from school when the car "started to lurch and jerk towards the front." The car's power shut off in the middle of an intersection, but Benny was eventually able to get the car turned back on and drove the car back home. Benny drove the car to Mercedes-Benz of San Diego the next day to have the car fixed. The service operators could not replicate the problems Benny had with her car, but did fix a transmission problem. At the time of the repair, Benny registered 21,854 miles on the car.

On May 24, 2011, Benny brought her car to Mercedes-Benz of San Diego once again. Benny claimed that she "heard a loud boom sound in [her] car," that this noise preceded "a rattling metal noise" that occurred when driving at slow speeds, and that

the car continued losing power and lurching while driving. The dealership once again was unable to duplicate the car's problems, but Benny testified that this is when she "realized that this car is possibly definitely defective." At this time, the car's mileage was at 39,632 miles.

On September 15, 2011, Benny brought the car into the dealership again. At this point the car had 42,154 miles on the odometer. On this visit, the mechanics verified that a scraping sound was coming from the transmission. Benny declined their offer to remove the transmission oil pan to inspect the problem and advise on its repairs because she was "very upset" that the dealership had not diagnosed or fixed the problem on earlier visits. Instead, Benny drove the car to Hoehn Mercedes to see if they would inspect and repair the car. At this time, Benny had driven the car 42,302 miles. One of Hoehn Motors's employees called Benny the next morning and told her that nothing was wrong with the car and that he "would drive it to Timbuktu."

On September 29, 2011, Benny's car swerved and turned off while she was driving on the freeway. She managed to turn the car back on, drove it off the freeway, and had the car towed to Hoehn Motors. A few days later, Benny demanded a "repurchase" of the vehicle. Mercedes-Benz denied her request, finding that the "vehicle does not qualify for refund or replacement" because it lacked a defect that was both under warranty and incurable by repair.

In March 2012, Benny brought suit against the dealership and Mercedes-Benz. In October 2012 Benny filed her operative first amended complaint alleging the following causes of action, listed respectively: (1) violation of the Consumers Legal Remedies Act (CLRA; Civ. Code, § 1750 et seq.); (2) violation of

express warranty under the Song-Beverly Consumer Warranty Act; (3) violation of implied warranty of merchantability under the Song Beverly Consumer Warranty Act; (4) breach of express warranty under the Magnuson-Moss Warranty Act; (5) breach of implied warranty under the Magnuson-Moss Warranty Act; and (6) violation of Business and Profession Code section 17200 et seq. As stated in Benny's opening brief on appeal, she eventually tried her case to a jury on two theories: "The first was breach of express warranty and the second was breach of the implied warranty of merchantability."

The Trial

At trial, Benny presented evidence from an expert that the transmission failed because it was improperly assembled in the manufacturing process, which caused the transmission to "explode." After the lawyers concluded their arguments, the jury received a special verdict form that contained questions about both the express and the implied warranty of merchantability claims. It read as follows:

"We the jury in the above-entitled action, find the following special verdict on the questions submitted to us:

1. Did the 2007 Mercedes-Benz S550 purchased by Wassan Benny have at least one defect in the transmission which made the 2007 Mercedes-Benz S550 unsafe?
____Yes ____No

If your answer to Question No.1 is "No", go to Question No. 3.
If your answer to Question No. 1 is "Yes", then answer Question No. 2.

2. Was the defect in the transmission present in the 2007 Mercedes-Benz S550 within one year of its sale to Wassan Benny?
____Yes ____No

3. Did the 2007 Mercedes Benz S550 vehicle have a defect or nonconformity covered by Mercedes-Benz USA's written warranty?
____Yes ____No

If your answers to Question No. 1 or Question No. 2 is "No", and your answer to Question No. 3 is "No", stop here, answer no further questions, and have the presiding juror sign and date this form. If your answers to Questions No. 1 and 2 are "Yes, but your answers to Question No. 3 is "No", then go to Question No. 7. If your answers to Question No. 3 is "Yes", then answer Question No. 4.

4. Did the 2007 Mercedes-Benz S550 vehicle's defect or nonconformity substantially impair the motor vehicle's use, or safety to a reasonable purchaser?
_____ Yes ____No

If your answer to Question No. 4 is "No", stop here, answer no further questions, and have the presiding juror sign and date this form except if your answers to Questions No. 1 and 2 are "Yes" then go to Question No. 7. If your answers to Question No. 4 is "Yes", then answer Question No. 5.

5. Did Mercedes-Benz USA's or any authorized repair facility fail to repair the vehicle to match the written warranty after a reasonable number of opportunities to do so?
____Yes ____No

If your answer to Question No. 5 is "No", stop here, answer no further questions, and have the presiding juror sign and date this

form except if your answers to Questions No. 1 and 2 are "Yes" then go to Question No. 7. If your answers to Question No. 5 is "Yes", then answer Question No. 6.

6. Did Mercedes-Benz fail to promptly replace or repurchase the 2007 Mercedes-Benz S550?
____Yes ____No

If your answer to Question No. 6 is "No", stop here, answer no further questions, and have the presiding juror sign and date this form except if your answers to Questions No. 1 and 2 are "Yes" then go to Question No. 7. If your answers to Question No. 6 is "Yes", then answer Question No. 7.

7. What are Wassan Benny's damages?

Total amount paid for the 2007 Mercedes-Benz S550 $_____

Go to Question No. 8.

8. When was the first service date when Wassan Benny made a complaint to Mercedes-Benz USA or it authorized repair facility regarding a complaint about a defect covered by warranty that substantially impaired the vehicle's use, value or safety? Date of service: _____

Go to Question 9.

9. Multiply the amount in response to Question No. 7 by the number of miles the vehicle was driven before it was brought for repair as indicated in your response to Question No. 8. Divide that amount by 120,000 and insert the result below. This is referred to as the value of the use.

Value of Use:

10. Subtract your response to Question No. 9 from your response to Question 7 and indicated below.

Total Damages:

11. Did Mercedes-Benz USA willfully fail to repurchase or replace the 2007 Mercedes-Benz S500?

____Yes ____No

If your answer to Question No. 11 is "Yes", then answer Question No. 12. If your answered "No", stop here, answer no further questions, and have the presiding juror sign and date this form.

12. What amount, if any, do you impose as a penalty? You may not exceed two times the amount answered in response to Question No. 10.

Penalty: $_____."

During deliberations, the jury sent the trial court a question asking whether there was another amount of damages that could be determined that was less than the total price of the car. Counsel conferred with the court. Over Mercedes Benz's request that a new line be placed on the verdict form to indicate damages for the implied warranty claim, the court ruled in favor of Benny, and did not change the verdict form, indicating the damages had to be based on the total amount paid for the car, not by repair costs or some other measure.

The jury ruled in favor of Benny on the implied warranty of merchantability, finding that a defect existed in the transmission within a year of sale, but rejected her express warranty claim. The jury found that Benny paid $117,995.87 for the vehicle and, after accounting for mileage usage, awarded her $78,998.98 in damages. However, when the jury was polled, some jurors

expressed their discomfort with the conclusions they had reached in the special verdict form:

"The Court: Juror number 3?

Juror No. 3: We didn't have a choice [in] that number [i.e. for the amount of damages].

Juror No. 8: That's exactly right.

Juror No. 3: It's not fair to ask us that question. We didn't have a choice.

The Court: Didn't have a choice on that number.

Juror No. 3: It was an ambiguous question. I'm sorry.

The Court: Was there a vote taken to get there?

Juror No. 3: There were questions asked and we were told we don't have a choice.

Juror No. 12: We had to put that number in there.

Juror No. 6: We submitted questions and every answer that came back - -

Juror No. 3: Was no.

Juror No. 6: - - Was a definite no.

The Court: I know because I wrote you a note.

Juror No. 3: So why ask that question? We don't understand why that's a question in there.

Juror No. 6: We couldn't understand why that was even in there.

The Court: Okay. Well - -

Juror No. 8: Because we were told what price to put there.

The Court: [Jury Foreperson], was there a vote to arrive at that number?

Juror No. 3: There was a decision.

Juror No. 6: There was a decision that really wasn't ours to make. We were told that was the number.

The Court: Okay. And while you were back there, would you have placed a different number in there?

(Jurors respond in the affirmative.)

The Court: And so let me ask you something. What number - - what other number would you have put in there?

Juror No. 6: I believe in our discussion, we felt that the number should have been the price of a transmission and not the total price of the car."

After hearing the jurors' comments, the trial court excused the jury. During a series of exchanges that followed, the court advised Mercedes-Benz that it could move for a new trial, and that the court would look at the issue in that context. Further, the court observed that there may have been an error because the special verdict form "painted [the jurors] into a corner" by forcing them to award a buyback value rather than award the cost of a new transmission. The court stated that "something [was] not right here to say that that's the only remedy available."

On May 20, 2015, the trial court granted Mercedes-Benz's motion for new trial. The court's order reads as follows: "The Special Verdict form was deficient and did not conform to Civil Code Section 1794(b)(1) and 1794(b)(2) in that the jury was not asked to reach two important questions which would have properly led them to the correct remedy."

After the trial court denied Benny's motion for reconsideration, Benny filed a timely notice of appeal.

DISCUSSION

Benny contends the order granting a new trial must be reversed because the special verdict form was not deficient and contained no legal error. We disagree and affirm.

I. Mercedes-Benz's Claim of Error are not Forfeited

Benny first contends that Mercedes-Benz's assertion that the special verdict form contained legal error is forfeited because Mercedes-Benz did not object on the record to the verdict form prior to the jury being discharged. Benny relies on *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 131 for the proposition that an objection to the omission of a question from a special verdict form can only be made before the jury is discharged. We agree with the legal proposition of Benny sets forth, but find her argument fails because he mischaracterizes the record when she claims a timely objection to the verdict form was not registered.

Here, the record contains an uncontested declaration made by counsel for Mercedes-Benz which was appended to its motion for new trial demonstrating that an objection to the special verdict form was made in a timely manner. The declaration indicates as follows. While the jury was deliberating, there were a number of in-chambers conferences held to discuss written questions submitted by the jury. During one of those discussions, the court acknowledged that the verdict form was ambiguous because it did not set forth the appropriate remedy for a violation of the implied warranty cause of action. The court suggested the ambiguity could be resolved by entering a new line on the verdict form setting forth the appropriate damages award for the implied warranty cause of action. Mercedes-Benz's counsel asked that the implied warranty claim be identified on the verdict form, along with an additional line for damages based on that claim, so that the jury could match it to the instructions. The court indicated that it could fix the verdict form to get the jury back on

course, but Benny's counsel insisted that the form remain as it was. The verdict form was not changed.

In a strikingly similar case, *American Modern Home Ins. Co. v. Fahmian* (2011) 194 Cal.App.4th 162, 170 (*American Modern Home*), the Court of Appeal determined that an objection to the inclusion of a question on a special verdict form made during an unreported discussion was sufficient to preserve the issue for appeal. Although counsel's objection was initially unreported, it was discussed later by counsel and the court during reported posttrial hearings. At those hearings, opposing counsel never claimed an earlier objection was not made. (*Ibid.*) We find the same analysis applicable here. Mercedes-Benz's counsel's declaration in support of the motion for new trial memorialized its earlier unreported objection made to the special verdict form during an in-chambers conference. During posttrial hearings on the new trial motion, Benny's counsel never claimed Mercedes-Benz misrepresented the fact that it made an off-the-record objection. We will not find forfeiture under such circumstances.

To avoid this conclusion, Benny asserts the objection to the verdict form was not made until Mercedes-Benz posttrial brief, which was filed after the jury was discharged. This simply misconstrues the record. The declaration in the motion for new trial shows Mercedes Benz objected to the verdict form during the in chambers conference before the jury was discharged, even though the declaration was included in a posttrial motion.
In addition, we find absolutely unconvincing Benny's attempt to distinguish *American Modern Home* by asserting that the objection here was to the *omission* of a question on the verdict

form instead of to the *inclusion* of a question on the verdict form as was the situation in that case.[1]

II. The Order for a New Trial was Properly Granted

Turning to the merits of this case, Benny contends the trial court improperly granted a new trial motion as she was entitled to the remedy granted by the jury because she sought only to return the car and have Mercedes-Benz repurchase the car. She is mistaken.

Standard of Review

When reviewing a decision to grant a motion for a new trial, the reviewing court examines "whether the ruling the trial court claims was made in error is as a matter of law truly error." (*Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138, 147 (*Donlen*).) When the trial court has found some basis for overturning the verdict, "'its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.'" (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1124.) The trial court's decision "'will be affirmed if it may be sustained on any ground, although the reviewing court might have ruled differently in the first instance.'" (*Ibid.*) However, "[i[f there were no legal errors at trial, the order granting a new trial on the basis of error in law will be reversed." (*Donlen, supra*, at p. 147.)

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[1] We, like the court in *American Modern Home*, pause to point out that "this debate over whether an objection was made could and should have been avoided if the trial court and counsel had put the objection and ruling on the record immediately after the chambers conference." (*American Modern Home, supra,* 194 Cal.App.4th at p. 170.)

The Song-Beverly Act

In 1970 the Legislature adopted the Song-Beverly Consumer Warranty Act (Stats. 1970, ch. 1333, p. 2478 et seq. (Song-Beverly Act)), which regulates warranty terms, imposes service and repair obligations on manufacturers, distributors and retailers of consumer goods who make express warranties, requires disclosure of certain information in express warranties and expands the consumer's remedies for breach of warranty. (*Krieger v. Nick Alexander Imports, Inc.* (1991) 234 Cal.App.3d 205, 213 (*Krieger*).) Although Benny brought claims against Mercedes-Benz under the Song-Beverly Act for breach of express warranty and breach of the implied warranty of merchantability, she did not prevail on her express warranty claim. Therefore, we confine our discussion to the implied warranty portion of the Act.

The Song-Beverly Act provides for an implied warranty of merchantability in every sale of consumer goods at retail (Civ. Code, § 1792) and an implied warranty of fitness under specified conditions (Civ. Code, § 1792.1). The Song-Beverly Act expressly prohibits providing express warranty protection in place of the implied warranties of quality and fitness: "[A] manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given, may not limit, modify, or disclaim the implied warranties guaranteed by this chapter to the sale of consumer goods." (Civ. Code, § 1793.) The Song-Beverly Act "supplements, rather than supersedes, the provisions of the California Uniform Commercial Code. (Civ. Code, § 1790.3; see also Civ. Code, § 1794, subd. (b), incorporating specific damages provisions of the Cal. U. Com. Code.)" (*Krieger*, *supra*, 234 Cal.App.3d at p. 213.)

Civil Code section 1794 describes two different remedies available for consumers seeking relief under the Song-Beverly Act for a breach of the implied warranty of merchantability. First, if the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, "'the buyer may . . . recover[] so much of the price as has been paid . . . .'" (*Mocek v. Alfa Leisure, Inc.* (2003) 114 Cal.App.4th 402, 406; see also, Civ. Code, § 1794, subd. (b)(1).) However, "[w]here the buyer has accepted the goods, . . . the measure of damages shall include the cost of repairs necessary to make the goods conform." (Civ. Code, § 1794, subd. (b)(2).) So, the remedies under the Song-Beverly Act hinge upon whether the buyer has rejected or accepted the goods. Further, it is only when the buyer has either rightfully rejected the good that the buyer can recover the purchase price.

Benny asserts that by providing two different routes of remedies for potential plaintiffs, the Song-Beverly Act "requires" a buyer to elect his choice of remedies, and she elected the remedy of canceling the sale and seeking the recovery of the money she paid for her car. While Benny sought the more favorable damages award for return of the vehicle at trial, by law this was not an election she was required to make. Instead, it was a damage award to which she had to prove to the jury she was entitled. The California Legislature explicitly rejected her argument in the context of commercial contracts generally, and we see no argument in Benny's briefs on appeal to suggest a different rule under Song-Beverly: "The buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to [the buyer]. . . . The remedy under this section is instead referred to simply as

'revocation of acceptance' of goods tendered under a contract for sale and involves no suggestion of 'election' of any sort." (Comm. Code, § 2608, Official UCC Comment.) Benny's reliance on *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246 (*Gavaldon*), to support her proposition fails. Nowhere in that opinion does the Supreme Court indicate that a such an election need be made. The portion of the opinion to which Benny points discusses only that a new theory of damages may not be raised for the first time on appeal. (*Gavaldon*, at p. 1264.)

Furthermore, the Song-Beverly Act was "intended for the protection of the consumer." (*Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 184.) Benny's theory would leave potential plaintiffs more vulnerable and less protected. If implemented, a plaintiff who chooses to revoke the acceptance goods would be precluded from receiving any remedy whatsoever if a jury found the revocation was not justifiable. We will not find that a statute which is designed to provide greater protection for consumers would so restrict their remedies.

We also reject Benny's claim that she unequivocally proved that she qualified for the revocation remedy under the Song-Beverly Act. A consumer is entitled to the "revocation" remedy only if he or she has "rightfully rejected or justifiably revoked" the goods. (Civil Code, § 1794, subd. (b)(1).) The fact that the buyer chose to return the goods is not dispositive; it must "occur within a reasonable time after the buyer discovers, or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects." (*Gavaldon, supra,* 32 Cal.4th at pp. 1263-1264.)

As Benny concedes, the jury must determine whether she rejected or accepted the vehicle, and from this factual determination the entitlement to a given remedy flows. In this case, the question of whether Benny rightfully rejected the vehicle was never answered by the jury because of the structure of the special verdict form. The special verdict form merely asked the jury to determine whether the vehicle had at least one defect in the transmission (Question 1) and whether the defect was present within one year of its sale to Benny (Question 2). The affirmative responses to these questions proved one thing only: Mercedes-Benz breached an implied warranty. Those affirmative responses did not resolve the question of the remedy to which Benny was entitled as a result of the breach. The jurors should have been tasked with resolving whether Benny rejected the vehicle within a reasonable time period and before the vehicle had been substantially changed. Without having these questions resolved in Benny's favor by the jury, she was simply not entitled to the nature of the damages it awarded. The verdict form here improperly directed the jury all it had to do was find a breach of an implied warranty before it had to proceed to calculate Benny's damages by determining the "total amount paid for the [vehicle]," and subtracting from that amount the value Benny derived from using the vehicle in the time period before she returned it. This is the very error that Mercedes-Benz's counsel attempted to correct in the in-chambers conference; the error the jurors protested to when rendering their verdict, and the same error the trial court found to be sufficiently prejudicial so as to merit a new trial. We add our voice to the chorus. The special verdict form contained prejudicial legal error and the trial court did not abuse its discretion in granting a new trial.

Finally, we find unpersuasive Benny's arguments that the special verdict form was complete because a sufficient number of jurors upheld a finding of a breach of implied warranty of merchantability. We do not dispute Benny's assertion that our Constitution mandates that three-fourths of the jury must agree on a verdict in civil cases for it to be standard. (Cal. Const. Art. I, § 16.) However, a verdict by the appropriate number of jurors need not be accepted as complete or correct. Here, the required 9 out of 12 jurors may have found that she had a defective vehicle, but no jurors found that she justifiably revoked the vehicle because the jury did not have the opportunity to consider this question. We echo Mercedes-Benz's observation that "[a] unanimous verdict on a materially erroneous verdict form is no verdict."

DISPOSITION

The order granting a new trial is affirmed. Respondents are awarded costs on appeal.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.